IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BARBARA A. PRICE	**APPELLANT/CROSS-APPELLEE**
VS.	**CASE NO. 2007-WC-01487-COA**
OMNOVA SOLUTIONS, INC.	**APPELLEE/CROSS-APPELLANT**
A SELF-INSURED	

BRIEF OF APPELLEE/CROSS-APPELLANT OMNOVA SOLUTIONS, INC.

On Appeal from the Circuit Court of Lowndes County, Mississippi

(Oral Argument Not Requested)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges may evaluate possible disqualifications or recusal.

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Circuit Judge
(7) Hon. Lee J. Howard
Lowndes County Circuit Court

Administrative Judge
(8) Hon. Cindy P. Wilson
Mississippi Workers' Compensation Commission

Full Commission of the Mississippi Workers' Compensation Commission
(9) Liles Williams, Chairman
(10) John Junkin, Commissioner
(11) Augustus L. Collins, Commissioner

Respectfully submitted,

OMNOVA SOLUTIONS, INC.

By: _____
One of Its Attorneys

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I. STATEMENT OF THE ISSUES

A. The Mississippi Worker's Compensation Commission ("Commission") erred in awarding Appellant/Cross-Appellee Barbara Anne Price ("Price") permanent partial disability benefits in excess of the functional loss to her upper extremities.

B. Price is not entitled to permanent partial disability benefits in excess of the benefits awarded by the Commission.

C. Price is not entitled to permanent total disability benefits for total loss of wage earning capacity.

D. The Commission did not err in crediting any award Price received by the short-term and/or long-term disability benefits paid by Self-Insured Employer Omnova Solutions, Inc ("Omnova").

E. Omnova should not be assessed penalties and/or interest.

II. STATEMENT OF THE CASE

Price and Omnova have appealed the Order of the Honorable Lee J. Howard ("Judge Howard"), dated August 22, 2007 ("Judge Howard's Order").

A. Procedural History

Price has alleged she sustained a repetitive motion injury during the course and scope of her employment at Omnova. On October 19, 2001, Price filed her workers' compensation claim alleging a physical injury resulting from bilateral carpal tunnel syndrome to both of her upper extremities. In her Petition to Controvert, Price alleged an injury date of February 8, 2000. The initial hearing was held on July 7, 2004. On March 24, 2005, the Administrative Judge Cindy P. Wilson ("Judge Wilson") awarded a twenty-five percent (25%) loss of wage earning capacity, with Omnova receiving credit for both short-term and long-term disability benefits it previously paid Price (the "A.J. Order").

On April 8, 2005, Price appealed the A.J. Order to the Commission. Price challenged Judge Wilson's determination regarding the amount of Price's loss of wage earning capacity, Omnova's ability to receive credit for its payment of long-term and short-term disability payments, and the denial of penalties and interest. Omnova cross-appealed requesting a reduction of the wage earning capacity computation.

The Final Order of the Commission ("Final Order") was issued on August 16, 2006. Because the A.J. Order was not consistent with loss of wage earning capacity jurisprudence, the Commission adjusted the A.J. Order, holding that Price sustained a twenty-five percent (25%) loss of use to her right upper extremity and a twenty percent (20%) loss of use of her left upper extremity. The Commission also affirmed the A.J. Order regarding the grant of credit for Omnova's payment of disability benefits to Price, and amended the A.J. Order to allow for the assessment of interest and penalties to cover any payments due and owing as a result of its final decision.

On August 18, 2006, Price filed an appeal with the Lowndes County Circuit Court. Omnova cross-appealed. Judge Howard's Order dated August 22, 2007 affirmed the Full Commission's Final Order.

On August 28, 2007, Price appealed Judge Howard's Order to this Court. Specifically, Price challenged Judge Howard's affirmation of the Final Order regarding the extent of her permanent disability and the Commission's grant of credit for short-term and long-term disability payments it made to Price. Omnova cross-appealed Judge Howard's Order September 17, 2007, challenging Judge Howard's affirmation of the Final Order regarding the extent of Price's permanent disability, as well as the imposition of interest and penalties for Price's alleged injury. Price's Brief was filed with this Court on April 15, 2008. Omnova files this Brief in response to the Price's Brief and in support of its Cross-Appeal.

B. Statement of the Facts

Price is forty-eight (48) years old and resides in Boyle, Mississippi. (Tr. 10-11)[1]. Price is a high school graduate and attended both East Mississippi Community College and Mary Holmes Community College, majoring in business. (Tr. 11-12). Before her employment with Omnova, Price held a variety of jobs both in factory positions and in the food industry—which included restaurant management experience. (Tr. 12-13).

While employed at Omnova, Price performed a variety of job duties. (Tr. 16-19). Price's hourly rate at Omnova was between $13-$14 per hour. (Tr. 45).

Both parties stipulated that Price sustained a compensable injury to her right and left upper extremities on or about February 6, 2000. (Vol. 2 R. 63). On the advice of her initial treating physicians, Price was referred to Dr. Kurt Thorderson ("Dr. Thorderson"). (Ex. 1 at 6). After diagnosing her with bilateral carpal tunnel syndrome, Dr. Thorderson performed a right carpal tunnel release on Price on June 9, 2000. (Ex. 1 at 9). Despite her physician's recommendation, Price refused surgery to treat her left carpal tunnel syndrome. (Tr. 65). On September 11, 2000, Dr. Thorderson released Price to return to full-duty work for four-hour work days, with full work days to begin on September 25, 2000. (Vol. 2 R. 71-72). However, Price returned to Dr. Thorderson after a two week period claiming an inability to work.[2] (Vol. 2 R. 72).

On March 15, 2001, Price reached maximum medical improvement ("MMI"). (Ex. 1 at 11). Dr. Thorderson assessed Price with a 17% functional impairment to the right upper

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[1] Citations to the record will be abbreviated as follows: Exhibits – "(Ex. __)"; Clerk of the Lowndes County Circuit Court's Papers – "(Vol. 1 R. __)"; Clerk of the Mississippi Worker's Compensation Commission – "(Vol. 2 R. __)"; Transcript from the Hearing at the Mississippi Workers Compensation Commission on May 2, 2005 – "(Tr. __)".

[2] Price was subsequently seen by Dr. Felix Savoie and Dr. Jeffery Summers from October 2000 to January 2001. During this time period, Price's test were noted as good, with her complaints being "subjective." (Vol. 2 R. 72).

extremity[3] and 10% functional impairment to the left upper extremity. (Ex. 1 at 11, 12). Additionally, Dr. Thorderson placed Price on permanent work restrictions of not lifting over twenty (20) pounds, and no highly repetitive use of her hands[4]. (Id.)

As a result of her injury, Price received disability benefits from three different sources. Price received total temporary and permanent partial disability benefits pursuant to the Mississippi Worker's Compensation statutes. In addition to her workers' compensation benefits, Omnova arranged for Price to receive short-term disability benefits, which totaled $54.18 bi-weekly for 52 weeks. (Tr. 84). Finally, Omnova assisted Price in receiving additional long-term disability benefits of $228.84 bi-weekly for 82 weeks. (Tr. 86). Omnova fully-funded both disability benefit programs. Price did not pay any premiums for these short-term and long-term disability benefits. (Tr. 84).

Following Dr. Thorderson's release, Price returned to work at Omnova only briefly. (Vol. 2 R. 66, 72). Following her employment with Omnova, Price made "questionable, or marginal efforts to return to gainful employment after being released from her treating physician." (Vol. 2 R. 89). Price allegedly applied for work at Holiday Inn Express, Comfort Suites, Brewski, Best Western, Homes Transportation and Pizza Hut. (Tr. 49-57). However, no applications or other documentation were submitted as evidence to substantiate her claims. (Tr. 69; Vol. 2 R. 67). Furthermore, Price admitted that she did not seek alternate gainful employment between October 2000 and June 2002, and only applied for employment with three or four employers thereafter. (Tr. 69-70). Price's cousin, who is a manager with Pizza Hut, advised Price that he could find work for her in an industry in which she previously served. (Tr.

[3] For the right upper extremity, Dr. Thorderson's assessment outlined a 10% impairment based on Claimant's carpal tunnel syndrome, and a 7% impairment due to an ulnar nerve injury in Price's right arm. (Ex. 1 at 11, 12).

[4] Dr. Thorderson described "highly repetitive use" as constant repetition all day long. (Ex. 1 at 20).

59). Instead of accepting gainful employment, Price chose to help her brother in his restaurant business by making sandwiches for no pay. (Tr. 61).

In June 2001, Sam Cox, a vocational rehabilitation expert, interviewed Price. (Tr. 100). In Mr. Cox's opinion, Price remains highly employable—especially given her age, education level and work background.[5] (Tr. 101-02). While he felt it likely that Price would start off at wage rate below her pre-injury level with Omnova, Mr. Cox opined that this wage level should increase after an initial probationary period. (Tr. 104). In his opinion, Mr. Cox believed Price would be able to earn pre-injury wages in the future. (Tr. 105, 112).

III. SUMMARY OF THE ARGUMENT

Price has not sustained permanent disability in excess of her functional impairment ratings in this case. When applying the legal factors for determining a loss of wage-earning capacity, which are used to determine if a scheduled-member claimant has sustained an injury that justifies an award in excess of her physician-assessed impairment ratings, it is clear that Price's permanent disability award should be limited to a 17% loss of use to her right upper extremity and a 10% loss of use to her left upper extremity.

At the very least, Price's permanent disability benefits should not exceed the Commission's award in this case. In his Order, Judge Howard affirmed the Commission's award to Price of a 25% permanent partial impairment rating to her right upper extremity and a 20% permanent partial impairment rating to her left upper extremity. In so ruling, Judge Howard held that the Commission was presented with substantial evidence, and applied a sound legal standard in reaching this finding. Accordingly, Price's request for an increase in the extent of her award of permanent partial disability benefits is meritless.

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[5] Price has not challenged the opinions of Mr. Cox. (Vol. 2 R. 90).

Additionally, the Commission was correct in allowing Omnova a credit for voluntary payments Price received via the short-term and long-term disability programs which Omnova fully funded for its employees. Finally, Omnova should not be assessed either penalties and/or interest on any award until it is final and it is definitely established that Omnova owes her disability benefits.

IV. ARGUMENT

Price has alleged a permanent disability to her right and left arm. Accordingly, the crux of this appeal focuses on the extent of benefits Price is entitled to as a result of any "loss" to both of these upper extremities. Additionally, this appeal addresses credit Omnova received for disability benefits paid to Claimant, as well as the propriety of the imposition of penalties and interest on any award Omnova is ultimately required to pay.

A. Standard of Review

In accordance with Mississippi jurisprudence, appellate courts are charged with reviewing all questions of law and fact decided by the Commission, and, as such, "[i]f the Commission's findings of fact and order are supported by substantial evidence, all appellate courts are bound thereby." Fought v. Stuart C. Irby Company, 523 So. 2d 314, 317 (Miss. 1988) (emphasis added). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and affords "a substantial basis of fact from which the fact in issue can be reasonably inferred." Central Electric Power Association v. Hicks, 110 So.2d 351, 357 (Miss. 1959). Thus, appellate courts should reverse the Commission's final order only if it finds the order to be clearly erroneous and not supported by substantial evidence. Fought, 523 So. 2d at 317. However, "[a] finding is clearly erroneous when, although there is some slight evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the

Commission in its findings of fact and in its application of the Act." Weatherspoon v. Croft Metals, Inc., 853 So. 2d 776, 780 (Miss. 2003).

B. Price's Award Should Be Limited to the Value of the Impairment to Her Left and Right Upper Extremities.

Price did not sustain an injury justifying permanent disability benefits in excess of the medical impairment rating assessed by Price's treating physician. An arm, or upper extremity, is a "scheduled member" within the Mississippi Worker's Compensation statutes. See MISS. CODE ANN. §71-3-17(c)(1). A scheduled member injury may result in two types of disability—permanent partial disability ("PPD") or permanent total disability ("PTD").[6]

Generally, injuries to a scheduled member are compensated through PPD benefits. A claimant is limited to 200 weeks of benefits for either the loss, or loss of use, of an upper extremity.[7] MISS. CODE ANN. §§71-3-17(c)(1). Within this 200 week limit, courts use two different types of "loss" to determine the exact level of benefits a claimant is due. Generally, the "functional loss" to a scheduled member serves as the basis for the level of PPD benefits a claimant will receive. Meridian Professional Baseball Club v. Jensen, 828 So. 2d 740, 745 (Miss. 2002). "Functional loss" refers to a claimant's assessed physical/medical impairment. Id.

In limited situations where the assessed functional loss is less than total, a claimant may establish an "occupational loss" in excess of the functional loss. Piggly Wiggly v. Houston, 464 So. 2d 510 (Miss. 1985). An "occupational loss" refers to the effect an injury has on a claimant's "ability to perform the duties of [her] employment." Jensen, 828 So. 2d at 745. In scheduled member cases, the extent of occupational loss is determined by evaluating the

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[6] PPD benefits are for injuries that are "partial in character but permanent in length." MISS. CODE ANN. §71-3-17(c). By contrast, PTD benefits are for injuries that render the employee unable to earn any wages in a competitive labor market. See JOHN R. BRADLEY & LINDA A. THOMPSON, MISSISSIPPI WORKER'S COMPENSATION, §5:3 (2006) (emphasis added).

[7] In this case, this would be a 200 week limit for each upper extremity, or 400 weeks.

claimant's post-injury loss of wage earning capacity as it effects the duties of her usual employment. Id. at 747. In these cases, the scope of "usual employment" is broader than the job held at the time of the injury.[8] Weatherspoon, 853 So. 2d at 779. Only if a claimant is able to establish an occupational loss in excess of the assessed functional loss is he or she is entitled to the value of this higher assessment. Walker Manufacturing Co. v. Cantrell, 577 So. 2d 1243 (Miss. 1991) (holding modified on other grounds).

Whether a claimant has sustained a loss of wage-earning capacity, and therefore has suffered an "occupational loss," is determined by evaluating the evidence **as a whole.** In addition to the medical evidence, the list of factors to be considered in this evaluation include the claimant's education level, amount of training, ability to work, job prospects, the continuance of pain, and any other related circumstances. See, e.g., Smith v. Rizzo Farms, Inc., 870 So. 2d 1231, 1236 (Miss. Ct. App. 2003). Here, Price's treating physician assessed a functional impairment of 17%[9] to her right upper extremity and 10% to her left upper extremity. In its Final Order, the Commission increased her functional rating, holding that Price sustained an occupational loss of 25% to her right upper extremity and 20% loss to her left upper extremity. (Vol. 2 R. 90). However, when applying the factors utilized by the courts in determining loss of wage earning capacity to the evidence in this case, the Commission clearly erred in awarding Price disability benefits in excess of her functional impairment rating.

Based on the evidence as a whole, Price's award in this case should be limited to the value of her functional impairment ratings. Price's ratings were determined by competent

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[8] See note 10, infra.

[9] Specifically, Dr. Thorderson assessed Claimant with a 10% medical impairment rating to the right upper extremity for her carpal tunnel syndrome and a 7% medical impairment rating to the right upper extremity for a work-related ulnar nerve problem. Dr. Thorderson provided no clarification as to whether the 7% impairment rating was in addition to, or in combination with, the 10% rating assessed for her right carpal tunnel condition. However, the Commission combined both awards and held that Claimant had a 17% functional impairment rating to her right upper extremity. (Vol. 2 R. 89).

medical evidence, as it was established that Dr. Thorderson, Price's treating physician, assessed her impairment ratings based upon American Medical Association Guidelines. (Ex. 1 at 11-12).

Moreover, based on the applicable factors outlined above, Price failed to establish a claim for a loss of wage-earning capacity at the hearing of this case. First, the courts are to examine a claimant's education and training. Rizzo, 870 So. 2d at 1236. Price is college educated, which places her in an above-average educational level for her labor market. (Tr. 10-71; 100). Price also testified about her varied training and work experience in multiple industries. (Tr. 10-71). According to Sam Cox, these attributes, combined with her educational background, made Price highly employable even after her work-related injury. (Tr. 100).

Courts also examine a claimant's job prospects in determining if she has sustained a loss of wage earning capacity beyond assessed impairment ratings. See Rizzo, 870 So. 2d at 1236. Price clearly had job prospects and **could** have found gainful employment. In fact, her cousin offered to find her work in the food service industry—an area in which she possessed previously experience, but instead of accepting gainful employment, Price chose to help her brother in his restaurant business by making sandwiches for no pay. (Tr. 59, 61). Mississippi courts have held that these types of alternate, post-injury job prospects are relevant in loss of wage earning capacity determinations. See Sellers v. Tindall Concrete Products, Inc., 878 So. 2d 1096, 1101 (Miss. Ct. App. 2004) (court noted former concrete worker's varied experience, training and work "would allow him to obtain employment [in the computer field] within his physical limitations").

A claimant must also show that she has made a reasonable effort to find employment in the same or other employment in order to prove a loss of wage earning capacity. See Cantrell, 577 So. 2d at 1249 ("On the evidence, the Commission may have found Cantrell experienced no permanent partial occupational impairment, in which event his compensation becomes a

function of his five percent medical impairment and the statutory directives for scheduled member injuries. Under these circumstances, we must reverse the judgment of the Circuit Court and direct that the Commission's order be fully reinstated.")

At the hearing, Price testified about her failure to make a good faith effort to obtain employment after reaching MMI. (Tr. 10-71). Though Price allegedly applied for work with a few employers, no applications or other documentation were submitted as evidence to substantiate her claims. (Tr. 69; Vol. 2 R. 67). Furthermore, Price admitted that she did not seek alternate gainful employment between October 2000 and June 2002, and only applied for employment with three or four employers thereafter. (Tr. 69-70). Both Judge Wilson and the Commission chastised Price for her lack of reasonable effort in seeking gainful employment. (Vol. 2 R. 73; 89-90). Mississippi courts have upheld the denial of benefits for loss of wage earning capacity where the claimant demonstrated no real effort to secure post-injury employment. See Boyd v. Mississippi Workers' Compensation Commission Self-Insurer Guaranty Association, 919 So. 2d 163, 169 (Miss. 2005); Weatherspoon, 853 So. 2d at 777 (court reinstated the Commission's decision to reduce award to value of assessed impairment rating, based in large part on evidence of claimant's less than diligent effort in pursuing other work).

Price possessed the post-injury education, training and work experience to make her an attractive prospect in her labor market. However, Price declined an offer of employment in an industry in which she had experience and neglected to put forth a good-faith effort to find employment. Based on the medical evidence, her lack of diligence in returning to work, and the additional factors utilized by the courts, Price has failed to establish an occupational loss in excess of her assessed medical disability. Accordingly, Price's wage earning capacity loss

should be reversed and this Court should render a judgment limiting her award to a 17% loss of the right upper extremity and a 10% loss of the left upper extremity.

C. Price is Not Entitled to Disability Benefits in Excess of the Benefits Awarded By the Commission.

At the very least, based on the totality of the evidence, Price's disability benefits should not exceed the value awarded by the Commission, because Price did not sustain an injury justifying permanent disability benefits in excess of the benefits actually awarded by the Commission.

1) Price is not entitled to an increase in her permanent partial disability award.

In her appeal, Price claims that she sustained an even higher occupational loss than assessed by the Commission. A claimant's occupational loss is determined by evaluating the evidence **as a whole**. The claimant's education, training, ability to work, job prospects, continuance of pain, and other related circumstances are all factors to consider in determining the extent of a claimant's occupational loss. Rizzo, 870 So. 2d at 1236.

In reaching its assessments, the Commission had the opportunity to consider a variety of evidence which, at the very least, supports the extent of its award. The evidence in this case unquestionably confirmed that Price was college educated and that she worked and received training in multiple industries. The medical evidence demonstrated that Price reached has MMI with modest work restrictions. Unrefuted expert testimony also established beyond a doubt that Price was employable **after** her injury and could approach her pre-injury wage level. Moreover, the evidence in this case also demonstrated Price's lack of reasonable effort to obtain suitable employment—a fact that was criticized by the Commission and Judge Wilson. The Commission opined that, based upon Price's "age, education, work history, her injury and modest restrictions,

her high pre-injury average weekly wage, and her efforts to find other employment," she was entitled to only limited permanent disability benefits. (Vol. 2 R. 90).

In her brief, Price argues that "[t]he totality of the lay, medical and expert evidence and testimony proves that [Price] has sustained a heightened industrial/occupational loss of use of her bi-lateral upper extremities . . . ." See Brief of Appellant at 9. In essence, Price is asking this Court to re-weigh the evidence and substitute its judgment for the judgment of the Commission. However, any re-weighing of evidence in this case will be an error. See Raytheon Aerospace Support Servs. v. Miller, 861 So. 2d 330, 335 (Miss. 2003) (citing Natchez Equip. Co. v. Gibbs, 623 So. 2d 270, 274 (Miss. 1993)).

The Commission's assessment of Price's permanent disability must be affirmed. The Commission possessed a wealth of evidence upon which to support its factual findings and applied the proper legal standard in reaching its decision. Accordingly, this Court should affirm the Final Order. Fought, 523 So. 2d at 317.

2) Price did not sustain a total occupational loss of her upper extremities.

In a scheduled member case, a claimant may be entitled to full benefits for a total occupational loss of the scheduled member, such as an upper extremity, **if** the proof supports such an award. There are generally two ways a claimant can attempt to establish a total occupation loss of a scheduled member—one under the traditional "evidence as a whole" analysis outlined above and the other involving a presumption of law.

Price has clearly failed to establish a total occupational loss of her upper extremities based on the "evidence as a whole" analysis. The Commission has determined that Price's scheduled member injuries did not warrant an award of benefits at or anywhere approaching a total occupational loss. (Vol. 2 R. 90). The Court should not overrule this finding.

This Court has ruled that in certain circumstances, if PPD to a scheduled member leaves a claimant unable to continue in the position he or she held at the time of injury, such an inability creates a rebuttable presumption of total occupational loss of that scheduled member. Jensen, 828 So. 2d at 747. However, the presumption under Jensen only arises if a claimant establishes that he or she has "made a reasonable effort but has been able to find work in h[er] usual employment."[10] Id. at 748 (emphasis added). In this case, Price failed to make the required "reasonable effort." Price conceded that her own cousin, who was a manager with Pizza Hut, felt confident that she could obtain a job in the food industry—an industry in which she possessed previous work experience, including store management. (Tr. 59). Yet Price declined to "step down" into such a position—choosing instead to pursue her disability claim while working at her brother's restaurant for free. (Tr. 60-62). Price admittedly failed to search for gainful employment before her June 2002 deposition. (Tr. 69-70). Following her deposition, Price did not seek employment, or otherwise complete an application for employment with the exception of three or four employers. (Tr. 66-68). Furthermore, both Judge Wilson and the Commission highlighted Price's less than reasonable efforts in seeking alternate post-injury employment. (Vol. 2 R. 73, 89). Price should not be rewarded for her dilatory efforts in seeking employment. Accordingly, Price was not entitled to the rebuttable presumption.

The presumption outlined in Jensen is a rebuttable one. 828 So. 2d at 747. Such a presumption may be overcome by showing the fact-finder—based upon age, education, training, and all other evidence—that the claimant has not suffered a total loss of wage earning capacity. Id. In this case, both Judge Wilson and the Commission were presented with expert testimony from Sam Cox, a vocational rehabilitation expert. Cox opined that Price remained employable

[10] In this context, "usual employment" is broad in scope, meaning "the jobs in which the claimant has past experience, jobs requiring similar skills, or jobs for which the claimant is otherwise suited by h[er] age, education, experience, and any other relevant factual criteria." Jensen, 828 So. 2d at 747.

after her injury, especially given her age, education and varied work background. (Tr. 99-114). Additionally, Cox firmly believed that Price could soon approach her pre-injury wage rate. (Tr. 105, 112). Price is an intelligent, college-educated individual. In light of her age, training, education, and modest work restrictions, Price has not sustained a total occupational loss to her upper extremities. The record evidence is more than sufficient to rebut the Jensen presumption. Accordingly, the Commission was correct in not granting Claimant the full 200 weeks of PPD benefits based on her partial loss of wage earning capacity.

In her Brief, Price chooses to attack the Commission's reliance on her feeble post-injury job search—arguing that, based on recent caselaw, "the sincerity of a [c]laimant's job search has little or no relevance in the analysis and determination of whether a [c]laimant has sustained a total loss of the injured scheduled member, when the anatomical impairment rating is less than 100%." See Brief of Appellant at 10. Price bases her argument on her version of the holdings in two recent pronouncements from this court. See Lifestyle Furnishings v. Tollison, 2008 WL 767424 (Miss. App. Mar. 25, 2008); Neill v. Waterway, Inc./Team America, 2008 WL 768725 (Miss. App. Mar. 25, 2008). Price's reliance on these recent holdings is misguided. Price claims that a reasonable job search is not a prerequisite for a finding of a total loss of occupational use of a scheduled member. See Brief of Appellant at 10. However, instead of supporting her position, the Lifestyle decision supports Omnova's position[11] and is instructive:

> The supreme court has recognized that determining the reasonableness of a claimant's job search is a fact-intensive process that is not amenable to the application of a precise formula. Thompson, 362 So. 2d at 641. There, the court stated: "It is proper for the Commission to consider the claimant's diligence in its efforts to determine the extent of the claimant's permanent disability. Moore v.

[11] In Lifestyle, the Court only examined the claimant's claim for permanent **total** disability benefits. Due to the claimant's inadequate job search, the Court reduced the claimant's award. The employer in Lifestyle did not attempt to reduce the claimant's award from a total occupational loss of the scheduled member to the value of percentage of the medical impairment rating. Thus, we do not know how the court would have decided that issue in light of the claimant's inadequate job search.

> Indep. Life & Accident Ins. Co., 788 So. 2d 106, 115 (¶34) (Miss. Ct. App. 2001). Additionally, the claimant's commencement of his job search one month before the hearing has been found to support the Commission's finding that the job search was not reasonable. Hale, 687 So. 2d at 1227. . . . In this case, the Commission concluded that Tollison's job search was not reasonable, considering: (1) Tollison's relatively young age; (2) her total occupational loss of her non-dominant arm; (3) her work restrictions; (4) the availability of work within the community; (5) Brawner's opinion that Tollison was employable; (6) the extent of Tollison's own job search, in which she made inquiries indiscriminately in the months before the hearing; and (7) other factors. It appears that the Commission was convinced that Tollison's job search was insufficiently diligent to establish a total loss of wage-earning capacity given her age, work restrictions, education, skills, work experience, and the availability of employment in her geographic area. This finding was supported by the substantial evidence cited by the Commission in support of its decision. Thus, the decision was within the Commission's authority to make, and it is beyond the power of this Court to disturb. The circuit court erred by re-weighing the evidence before the Commission concerning the reasonableness of Tollison's job search. We reverse the judgment of the circuit court and reinstate the Commission's decision.

Lifestyle Furnishings, 2008 WL 767424, at *7-8 (Miss. Ct. App. Mar. 25, 2008).

The reasonableness of a claimant's post-injury job search is **one of the factors** to be considered in determining the extent of a claimant's loss of occupational use of a schedule member when examining the "evidence as a whole." See Rizzo, 870 So. 2d at 1236; Jensen, 828 So. 2d at 747. In Lifestyle, the claimant was not attempting to utilize the Jensen presumption, so there was nothing precluding the Court from both admonishing the claimant for conducting an inadequate job search.[12] Here, Price cannot prevail under either scenario, because she has failed to establish a total occupational loss based on the evidence as a whole, and her failure to conduct a reasonable job search precludes her utilization of the Jensen presumption. The Neill decision does not present the same facts and circumstances present in Price's claim. In Neill, this Court affirmed the Commission's award of PPD benefits based on a 60% loss of occupational use to

[12] In Lifestyle, both the Court and the parties were examining the claimant's claim for permanent **total** disability benefits utilizing the rebuttable presumption outlined in Jordan v. Hercules, Inc., 600 So. 2d 179, 183 (Miss. 1992). Due to claimant's inadequate job search, the Court reduced the claimant's award.

the claimant's upper extremities. 2008 WL 768725, at *1. The claimant in that case did not rely on the Jensen presumption and the award was not for a **total** loss of occupational use. Id. Accordingly, Neill is easily distinguished.

Based on the foregoing, the Commission's assessment of PPD benefits based on Price's injuries to her upper extremities was legally sound and supported by substantial evidence. As such, the Commission's assessment in this regard should be affirmed.

3) Price is not entitled to permanent total disability benefits.

Price also argues in her Brief the she is entitled to PTD benefits. In Mississippi, a scheduled member injury can result in PTD, but only if such an injury renders the worker unable to resume the same or other employment after he or she adapts to his or her disability. Smith v. Jackson Construction Company, 607 So. 2d 1119, 1127-28 (Miss. 1992). In this alternate argument, Price alleges her scheduled member injuries have effectively caused her to suffer PTD.

Under Mississippi law, a claim for PTD requires a claimant to demonstrate a **total** loss of the ability to be employed in **any** employment—not just an inability to return to the worker's "usual employment." MISS. CODE ANN. §§71-3-3(i), 71-3-17(a) (emphasis added). Here, Price unquestionably retains wage earning capacity. Furthermore, the Commission had the opportunity to award Price PTD benefits in the Final Order, but did not, holding that Price had sustained only a partial loss of wage earning capacity. If Price could not satisfy the lower standard of establishing a total loss of wage earning capacity within her "usual employment" (i.e., a total occupational loss of scheduled member), then Price clearly cannot satisfy the heightened threshold of establishing a total loss of wage earning capacity in **any** employment. As the Court should affirm the Commission's decision to deny PTD.

In her brief, Price attempts to analogize her situation to the facts in McDonald v. I.C. Isaacs Newton Company. 879 So. 2d 486 (Miss. Ct. App. 2004).[13] See Brief of Appellant at 13-17. However, the facts before this Court are distinguishable from the facts in McDonald. McDonald had severe work restrictions, she was not college educated, and she conducted an unsuccessful reasonable job search but had no skills aside from manual labor. Id. at 491. Here, Price is college-educated and trained in a variety of industries. She received modest work restrictions. She only attempted to return to her pre-injury position for a two-week period. After leaving Omnova, Price failed to conduct a reasonable job search, but nevertheless received offers within her skill set—which she declined. In fact, the only similarity between the facts in McDonald and this case is that both claimants had factory experience.

In Lifestyle, this Court outlined several factors to consider in evaluating the reasonableness of a claimant's post-injury job search, including: (1) the delay between the achievement of MMI and the job search; (2) the good-faith effort put into the job search, especially if done quickly right before the hearing; (3) testimony from a vocational rehabilitation expert that the claimant remained employable based on her age, work restrictions, education and work history in other jobs; and (4) testimony from a vocational rehabilitation expert that the claimant was capable of securing gainful employment. 2008 WL 767424, at *7. Each of these factors are present in the present case. (Vol. 2 R. 90) (the Commission stated that its assessment of Price's permanent disability was based on "the evidence as a whole, including the [Price]'s age, education, work history, her injury and modest restrictions . . . and her efforts to find other employment.")

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[13] Here, Claimant contends that she should be awarded permanent total disability benefits because Omnova failed to rebut the Jensen presumption. (Vol. 1 R. 21). However, the Jensen presumption applies to total loss **of a scheduled member**—not to total loss for permanent total disability purposes. 828 So. 2d at747 ("[S]uch an inability creates a rebuttable presumption of total occupational loss **of the member**.") (emphasis added).

Price contends that she should be awarded increased disability benefits, in light of the "beneficent remedial purpose" of the Worker's Compensation Act. See Brief of Appellant at 8 (citing Spann v. Wal-Mart Stores, Inc., 700 So. 2d 308 (Miss. 1997)). However, the Mississippi Supreme Court has previously warned against awarding disability benefits in inappropriate situations:

> For this court to award those benefits which are meant to compensate for an **inability to work**, even though the worker is in fact able to secure employment **at a comparable** . . . salary, would bestow a windfall contrary to the specific beneficial and remedial purpose of worker's compensation.

Jensen, 828 So. 2d at 749 (citing Shumway v. Albany Port Tavern, Inc., 154 A.D. 2d 751 (N.Y. App. Div. 1989)) (emphasis added). PTD benefits exist for workers who, due to a work-related injury, have a total loss of wage earning capacity. PTD benefits exist for workers with **no** post-injury wage earning capacity. Unquestionably, Price has the ability to earn wages—she simply chooses not do earn wages. As such, the Commission was correct in not awarding Price PTD. Any benefits Price receives for the injuries to her upper extremities should be compensated solely through PPD or scheduled member benefits.

D. The Commission Did Not Err in Granting Omnova Credit for Short Term and/or Long Term Disability Benefits Previously Paid.

The Commission was correct in allowing a credit for the short term and long term disability benefits Omnova paid Claimant. The Worker's Compensation Act states that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." MISS. CODE ANN. §71-3-37(11). Mississippi jurisprudence rewards employers who willingly supply disability and pension programs to its employees that are over and above the statutorily mandated worker's compensation indemnity benefits. Western Electric, Inc. v. Ferguson, 371 So. 2d 864, 868 (Miss. 1979).

A more recent Mississippi decision supports the propriety of both Judge Wilson's and the Commission's decision to grant Omnova credit for its disability payments to Price. In Siemens Energy & Automation, Inc. v. Pickens, the Mississippi Court of Appeals conditioned the grant of credit to an employer for disability payments to an injured worker on the presence of employee contribution to the disability plan. 732 So. 2d 276, 288-89 (Miss. Ct. App. 1999). Specifically, the Court held that—consistent with Western Electric—an employer should be granted credit for disability payments if the plan was fully funded by the employer. Id. In this case, Omnova offered a fringe benefit plan providing for both long-term and short-term disability benefits to its employees. Furthermore, Omnova fully funded these programs. Price received these benefits in addition to the total temporary and permanent partial disability benefits Omnova voluntarily and promptly paid. Consistent with Mississippi case law, Omnova should be applauded for providing such employee benefits, and any award granted to Claimant should be credited for these generous payments by Omnova.

Price argues that Omnova should not receive credit for these payments because there is only scant evidence of the intent of these payments. Brief of Appellant at 19-20. Nonetheless, the evidence is not scant. Omnova offered uncontroverted testimony from its Health and Benefits Manager, Patricia Winklepleck, that the purpose of both beneficent disability plans was to replace a worker's income subject to certain certification requirements. (Tr. 83-87). Both Judge Wilson and the Commission were convinced that these payments were offered in lieu of compensation. Accordingly, their decision in this regard should be affirmed.

E. Omnova Should Not Be Assessed Penalties and Interest on Any Award.

Omnova should not be assessed penalties and interest on any award granted by the Commission. In the A.J. Order, Judge Wilson refused to assess any penalty and/or interest on her award. In its Order, the Commission did not reverse Judge Wilson's ruling. However, the Commission held that if, after a final calculation of the benefits, the facts justify assessment of penalties and interest, then they shall be assessed. Despite this language, there are no factors presently requiring the assessment of penalties and/or interest against Omnova in this case.

Section 71-3-37 of the Mississippi Code mandates a ten percent (10%) penalty on unpaid compensation benefits due prior to an award and a twenty percent (20%) penalty on compensation benefits due and unpaid following an award at the Commission or appellate court level. MISS. CODE ANN. §§71-3-37(5)-(6). The 10% penalty is immaterial for purposes of this case. Before the award from Judge Wilson, there were no payments due and owing, as Omnova had paid all total temporary and permanent partial benefits that had accrued at the time of the award. (R. 85-86). Furthermore, the 20% penalty only becomes relevant if the employer fails to pay any benefits within fourteen (14) days of the date that the order making the award becomes final. T.C. Fuller Plywood Company, Inc. v. Moffett, 95 So. 2d 475 (Miss. 1957). When an award of the Commission is appealed, such an award is not final. Weyerhaeuser Company v. Ratliff, 197 So. 2d 231, 234 (Miss. 1967). The Commission conditioned its award on the completion of "an accurate, up-to-date calculation of benefits due [Price], less applicable credits . . ." (Vol. 2 R. 91). Accordingly, Omnova should only be assessed the 20% penalty and interest only if it fails to pay an obligation due or owing within fourteen days after the Commission's award becomes final.

V. CONCLUSION

Because of Price's failure to exercise a good-faith effort to obtain employment, and because of other factors relating to her employability, the "occupational" disability award in this case should be reduced to the value of her medical/functional disability rating. Alternatively, the Commission's award should be affirmed because the decision is legally sound and supported by substantial evidence. The Commission's ruling that Omnova should receive credit for the voluntary disability benefits it paid Price in addition to her worker's compensation benefits should likewise be affirmed because it is legally sound and supported by substantial evidence. Moreover, the Commission's ruling granting a set-off for the employer-provided short-term and long-term disability payments should be affirmed for the same reasons. Finally, the Court should confirm that no penalties or interest should be assessed against Omnova until such time as the Commission's award becomes final.

Respectfully submitted this the 30th day of June, 2008.

OMNOVA SOLUTIONS, INC.

By: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Steve Carmody, do hereby certify that I have this date mailed, via United States Mail, postage prepaid, a true and correct copy of this RESPONSE BRIEF FOR APPELLEE/CROSS-APPELLANT OMNOVA SOLUTIONS, INC. to the following:

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This the 30th day of June, 2008.

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